8-2400-10762-1

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY

In the Matter of the Proposed Amendments to Rules Relating to Alcohol Assessment Reimbursement, Minnesota Rules Chapter 7408, and Incidents for License Revocation, Minnesota Rules, Chapter 7503

REPORT OF THE

ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde at 9:00 a.m. on June 25, 1997, at the Veterans Service Building in St. Paul, Minnesota. The hearing was held pursuant to an order of the Commissioner of the Department of Public Safety (Department or Agency) dated April 25, 1997.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. § 14.131 to 14.20 to hear public comment, to determine whether the Minnesota Department of Public Safety has fulfilled all relevant substantive and procedural requirement of law applicable to the adoption of rules, whether the proposed rules are authorized, needed and reasonable, and whether any modifications to the rules proposed by the Department after initial publication are substantially different than the rules published in the State Register.

The Department's hearing panel consisted of Jane Nelson, Management Analyst; Roland Hunter, Driver Safety Analysis Supervisor; and Assistant Attorney General Peter Marker. Less than twenty-five persons attended the hearing, eight signed the hearing register and two persons spoke at the hearing.

The record remained open for the submission of initial comments for five working days following the hearing, (i.e., through July 2, 1997). Pursuant to Minn. Stat. § 14.15, subd. 1, five additional working days were allowed for the filing of responsive comments. At the close of business on July 10, 1997, the rulemaking record closed.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the Agency takes any further action on the rule(s). The Agency may then adopt a final rule or modify or withdraw its proposed rule. If the Department; makes changes in the rule other than those recommended in this report, it must submit the rule with the complete hearing

record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the Agency must submit it to the Revisor of Statutes for a review of the form of the rule. The Agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On April 18, 1997, the Department of Public Safety requested the scheduling of a hearing and filed the following documents with the Chief Administrative Law Judge:

a. A copy of the proposed rules certified by the Revisor of Statutes.

b. The Notice of Hearing proposed to be issued.

c.The Statement of Need and Reasonableness (SONAR).

Exhibits 2, 3, 4, and 5.

2. On May 12, 1997 the Department published its Notice of Hearing and the rule amendments proposed in this proceeding in 21 S.R. 1636 - 1641. Exhibit 11.

3. On May 6, 1997 copies of the hearing notice and the proposed rules were mailed to every person on the rulemaking list maintained by the Agency pursuant to Minn. Stat. § 14.14, subd. 1a (1996). Exhibit 12.

4. On May 6, 1997 the Agency mailed a copy of the hearing notice and the proposed rules to all persons identified in its Notice Plan and published the hearing notice and proposed rules in the manner set forth in its Notice Plan pursuant to Minn. Stat. § 14.14 and Minn. R. 1400.2060, subp. 2B. Ex. 12

5. The Agency's Additional Notice Plan, and all amendments thereto were approved by the Administrative Law Judge. Exhibits 6-8.

6. On May 8, 1997 the Agency mailed a copy of the SONAR to the Legislative Coordinating Commission pursuant to Minn. Stat. §§ 14.131 and 14.23 and Laws 1995, c. 248, § 6. Exs. 9-10.

7. The Agency's SONAR became available to the public on May 8, 1997, two weeks after the Agency ordered publication of the rulemaking notice in violation of Minn. Stat. §§ 14.131 and 14.23 (1995). The SONAR is dated April 17, 1997. Exhibit 5. However, the Department certified that it was not available to the public until May 8, 1997. Exhibit 10. Under Minn. Stat. §§ 14.131 and

14.23 the SONAR must be made available to the public before the agency orders publication of the rulemaking notice. That order was made on April 25, 1997. Exhibit 14. Although the SONAR was not available to the public in a timely manner, the violation is a harmless error for purposes of Minn. Stat. § 14.15, subd. 5 (1996). The statute provides that the Administrative Law Judge shall disregard any error or defect resulting from the agency's failure to satisfy a procedural requirement if the Judge finds that noncompliance did not deprive any person of an opportunity to participate meaningfully in the rulemaking process. Nobody objected to the tardy availability of the SONAR and it was available more than one and one-half months prior to the rulemaking hearing. Under these circumstances it is concluded that the two-week delay in its availability was a harmless error.

8. On July 1, 1996 the Agency published a request for comments on planned amendments to rules governing incidents for license revocation in the State Register (21 S.R. 16) pursuant to Minn. Stat. § 14.101, subd. 1 (1995). Ex. 1.

9. In its SONAR the Agency considered the six items set forth in Minn. Stat. § 14.131. SONAR at 6-9.

10. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and no additional notice is required under the statute.

11. On the day of the hearing, the Department placed the following documents in the record:

Ex. 1. Notice requesting Comment on Planned Amendments to Rules relating to the cancelation of drivers' licenses as published in the State Register on July 1, 1996.

Ex. 2. Letter dated April 18, 1997 to the Honorable Kevin Johnson, Chief Administrative Law Judge, Office of Administrative Hearings, to initiate a hearing in accordance with Minnesota Rules, part 1400.0300 and Minnesota Statutes, section 169.128. This submittal contained Exhibits 3-5.

Ex. 3. A proposed notice and order for hearing;

Ex. 4. A copy of the proposed rules with certification as to form by the Revisor of Statutes, dated 4/14/97.

Ex. 5. A copy of the signed Statement of Need and Reasonableness dated 4/l17/97 which contained a description of the plan for additional notice with Appendix A attached.

Ex. 6. Letter from Administrative Law Judge Jon L. Lunde dated April 22, 1997, approving the additional notice plan.

Ex. 7. Memorandum dated April 24, 1997 faxed to Laura Nehl-Trueman, Office of Administrative Hearings, indicating parties to be added to the additional notice plan.

Ex. 8. Letter from Administrative Law Judge Jon L. Lunde dated April 24, 1997 approving additional parties for addition to the notice plan.

Ex. 9. Memo dated May 8, 1997 to the Legislative Coordinating Commission submitting the Statement of Need and Reasonableness pursuant to Minnesota Statutes, sections 14.131 and 14.23.

Ex. 10. Certificate of mailing of the Statement of Need and Reasonableness to the Legislative Coordinating Commission on May 8, 1997.

Ex. 11. A copy of the Notice Withdrawing proposed rules as published in the State Register October 28, 1997, the Notice Proposing rules With a Public Hearing, and the Proposed Rules published in the State Register Monday, May 12, 1997.

Ex. 12. Certificate of Giving Notice Pursuant to the Approved Notice Plan for Compliance with Minnesota Statutes, Section 14.22.

Ex. 13. Notice of Withdrawal of previously proposed rule as mailed.

Ex. 14. Notice of Hearing as mailed.

Ex. 15. Copy of proposed rules as mailed.

Ex. 16. Copy of Statement of Need and Reasonableness as mailed.

Ex. 17. Certificate of Agency Mailing List with a copy of the list of parties registered with the department attached. A copy of the Notice Withdrawing previously proposed rules, the Notice of Hearing, and a copy of the proposed rules were mailed May 6, 1997 to all parties on the certified agency list.

Ex. 18. A copy of the list of treatment programs licensed by the Department of Human Services and treatment programs in health care facilities that were mailed, on

May 6, 1997, a copy of the Notice Withdrawing previously proposed rules, the Notice of Hearing, a copy of the proposed rules, and a copy of the Statement of Need and Reasonableness.

Ex. 19. A copy of the list of members of the Chemical Abuse Review Panel that were mailed, on May 6, 1997, a copy of the Notice Withdrawing previously proposed rules, the Notice of Hearing, a copy of the proposed rules, and a copy of the Statement of Need and Reasonableness.

Ex. 20. A copy of the list of members of the legislative Commission on Confinement and Treatment of DWI Recidivists who were mailed, on May 6, 1997, a copy of the Notice Withdrawing previously proposed rules, the Notice of Hearing, a copy of the proposed rules, and a copy of the Statement of Need and Reasonableness.

Ex. 21. A copy of additional mailing list of persons who had expressed an interest in this rulemaking matter including attorneys representing offenders, tavern owners, law enforcement officials, and members of Mothers Against Drunk Drivers.

Ex. 22. A copy of the memo mailed May 6, 1997 to all deputy registrars in the state requesting them to post the attached Notice Withdrawing a Rule and Notice of Hearing in a conspicuous place in the public service area and a copy of the list of those 172 Deputy Registrars.

Ex. 23. A copy of a department press release announcing the proposal of the rules and comment periods, summarizing the rule content and indicating who may be contacted about the rules and how to obtain copies of all pertinent documents and the attached list of all the print, radio and TV stations in the state to which the release was faxed on May 8, 1997.

Ex. 24. A copy of the notice announcing the proposed rules and the availability of the Notice to Adopt with a Public Hearing, Proposed Rules, and Statement of Need and Reasonableness that was placed on the WEB page of the Minnesota Department of Public Safety, Driver and Vehicle Services Division on May 8, 1997 and available through June 25, 1997.

Ex. 25. A copy of a newspaper article announcing the proposed rule changes that was published by the Winona Post and Roseau Times-Region May 14, 1997.

Ex. 26. Comment received June 10, 1997 from the Hennepin County Chemical Dependency Council, Barbara Wittstruck and Mike Kirkeberg.

Ex. 27. Comment received June 10, 1997 from C.R.E.A.T.E., Inc., Judi May Gordon, Executive Director.

Ex. 28. Comment received June 10, 1997 from Amethyst Counseling Services, Inc., Timothy Rice, Director of CD Programs.

Ex. 29. Comment received June 11, 1997 from Steve Schneider and Judi Gordon from the State Alcohol and Other Drug Abuse Advisory Council.

Ex. 30. Comment received June 11, 1997 from the Lakeview Chemical Dependency Unit, Outpatient Department, Douglas County Hospital, Alexandria, Minnesota, from Maryanne Rollie Of the Minnesota Association of Resources for Recovery and Chemical Health Public Policy Committee.

Ex. 31. Comment received June 11, 1997 from Leslie Hiney and Mary Roske-Groth.

12. The following written comments were also submitted to the Administrative Law Judge during the course of this proceeding:

A. Comment from Mark Casagrande, Program Director of Park Avenue Center on June 30, 1997.

B. Comment from Melissa Howell, Director of Victim Services, MADD, Minnesota on June 30, 1997

C. Comment from Robert T. Olander, Division Manager, Hennepin County, on July 3, 1997.

D. Comment from Leslie Hiney on July 2, 1997.

13. The documents referred to in the foregoing findings were available for inspection at the Office of Administrative Hearings from and after the date of the hearing or the date they were filed.

Statutory Authority

14. In its SONAR, the Department stated that it has authority to adopt the rules proposed in this proceeding under Minn. Stat. § 299A.01, subd. 6 which states that "the commissioner of public safety shall have the power to promulgate such rules pursuant to chapter 14, as are necessary to carry out the purposes of Laws 1969, chapter 1129. Chapter 1129, art. 1, § 18, subd. 2 states that "all the powers and duties now vested in or imposed upon the department of highways and the commissioner of highways in regard to driver's licensing and safety responsibilities as prescribed in Minnesota Statutes 1967, Chapters 169, 170 and 171 are hereby transferred to, vested in, and imposed upon the commissioner of public safety." These chapters pertain to highway traffic regulation, safety responsibility, and drivers licenses and drivers training schools. They include the statutes governing a driver's use of alcohol or other chemicals and the suspension, revocation, and reinstatement of the licenses of drunk drivers.

15. In its SONAR the Department also stated that it has specific statutory authority to promulgate the amendments proposed in this proceeding under Minn. Stat. § 169.128. It states:

> The commissioner of public safety may promulgate rules to carry out the provisions of sections 169.121 and 169.123. The rules may include forms for notice of intention to revoke, which shall describe clearly the right to a hearing, the procedure for requesting a hearing, and the consequences of failure to request a hearing; forms for revocation and notice of reinstatement of driving privileges as provided in sections 169.1261; and forms for temporary licenses.

16. In addition, the Department cited sections 171.165, subd. 5 and 14.06 as additional sources of rulemaking power. The former requires the commissioner to adopt rules administering that statute. The statute states the rules "must include procedures for issuing class D licenses to persons who have been disqualified from operating commercial motor vehicles but whose drivers licenses have not otherwise been revoked, suspended, canceled, or denied." The latter statute requires agencies to adopt rules "setting forth the nature and requirements of all . . . procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures applicable to the public."[1] Except as otherwise noted to the contrary in this Report, the Administrative Law Judge is persuaded that the Department is authorized to adopt the rules proposed in this proceeding under the statutory provisions it cited.

Rulemaking Legal Standards

17. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, one of the determinations which must be made in a rulemaking proceeding is whether an agency has established the need for and reasonableness of proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely

[1] Pursuant to Minn. Stat. § 14.05, section 14.06 authorizes agencies to adopt rules.

on legislative facts (i.e., facts concerning questions of law, policy and discretion), or it may simply rely on the interpretation of a statute or stated policy preferences. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989). The Department prepared its SONAR to explain and justify the amendments proposed by this proceeding. At the hearing, the Department primarily relied upon the SONAR to establish the need and reasonableness of these amendments. The SONAR was supplemented by the comments made by the Department at the public hearing and in its written, post-hearing comments.

18. The question whether a rule is reasonable depends on whether it has a rational basis. Minnesota case law has equated an unreasonable rule with an arbitrary rule. In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cit. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. Mammenga v. Department of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989) Broen Memorial Home v. Department of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985). The Minnesota Supreme Court has further defined the agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action . . ." Manufactured Housing Institute, supra, 347 N.W.2d at 244. An agency is entitled to make choices between possible approaches as long as the choices it makes are rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one a rational person could have made. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, 233 (1943).

19. In addition to need and reasonableness, the Administrative Law Judge must determine whether the rulemaking procedures followed comply with statutory requirements, whether the rules grant undue discretion to the agency, whether the agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule. Minn. R. 1400.2100. When changes are made to a rule after publication in the State Register, the Administrative Law Judge must also determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.15, subd. 3. The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2.

Nature of the Proposed Rules

20. This proceeding relates to two sets of rules: those contained in chapter 7503 and those in chapter 7408. Chapter 7503 pertains to the

revocation of drivers licenses for incidents involving the use of alcohol or controlled substances. Chapter 7408 relates to the Department's reimbursement of the costs incurred by counties in assessing the severity of a defendant's use of mood-altering chemicals. The Department is proposing amendments to chapter 7503 and the repeal of chapter 7408.

Background

21. The Department described the continuing problem caused by a drivers use of alcohol or controlled substances. It stated:

> The use of alcohol or controlled substances and driving continues to be a significant problem in Minnesota, particularly with respect to repeat offenders. Repeat driving while intoxicated (DWI) offenders are estimated to be involved in approximately 35 percent of all alcohol-related traffic fatalities. (Final Report, Commission on the Confinement and Treatment of DWI Recidivists, page 8). In 1996, the latest year for which figures are available from the Department of Public Safety, Driver and Vehicle Services Division, repeat offenders made up 50.22 percent of all DWI or implied consent license revocations (Appendix A). The total number of alcohol, controlled substance-related and implied consent revocations decreased from 38,717 in 1986 to 29,368 in 1996. First incident offenders also dropped sharply from a high of 23,527 in 1986 to 14,149 in 1994. But the number of first incident offenders has remained relatively stable since 1994 indicating a core of persons, around 50 percent, who are repeat offenders -- who continue to drive while intoxicated. Of the repeat offenders in Minnesota in 1996, 6,781 had two alcohol- or controlled-substance-related incidents, 3,809 had three incidents, 1,856 had four incidents, 963 had five incidents, and 1,210 had six or more incidents. (Appendix A).

In 1992, the Minnesota Legislature created a Commission on the Confinement and Treatment of DWI Recidivists to study and make recommendations on the problem of persons who repeatedly drive while intoxicated. In the commission's March 1993 report to the legislature it recommended that treatment programs for DWI recidivists be abstinence based and that a minimum number of contact days and hours and type of contacts be specified. (Commission Report, page 11). The proposed modifications to part 7503.1700, subpart 2 implement recommendations of the commission.

Additional changes to chapter 7503 are proposed to avoid duplicative chemical dependency assessments of offenders, clarify some existing regulatory requirements, and remedy problems experienced in the day-to-day administration of license revocation and reinstatement responsibilities by the department.

SONAR at 2.

22. The Department did not form a rule advisory work group in drafting the changes proposed in this proceeding. However, it consulted with individuals who provide or operate treatment programs, sentence or represent offenders, or have an interest in the issue. Furthermore, the Department relied on the recommendations and deliberations contained in the study by the Commission on Confinement and Treatment of DWI Recidivists (Commission), Final Report issued in 1993. Recommendations of the Commission are reflected in the proposed rules. The Department also consulted with members of its chemical abuse review panel and other persons with expertise.

General Comments

23. This report generally is limited to the discussion of those portions of the proposed rules that received significant critical comment or otherwise need examination. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of those provisions that are not discussed in this Report by an affirmative presentation of facts, that such provisions are authorized by statute, and that there are no other problems that prevent their adoption.

24. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed by the Department. Any language changes proposed by the Department, unless specifically noted to the contrary herein, were found not to constitute substantial changes.

Analysis of Proposed Rules

25. This proceeding primarily involves the provisions in chapter 7503 which governs the revocation and suspension of drivers licenses for alcohol- and controlled-substance-related incidents. It is an extensive rule which also contains provisions relating to the duration of suspensions and revocations, notices of suspension and revocation, required hearings following the suspension or revocation of a license, the reinstatement of licenses following suspension or revocation, license cancellation and denial, rehabilitation, restricted licenses, limited licenses, informal hearing procedures, assessments of drivers for alcohol- and controlled- substance-related incidents, special reviews, and other administrative procedures and requirements.

26. The definitions applicable to chapter 7503 are contained in Minn. R. 7503.0100. The department has proposed amendments to some of those definitions.

7503.0100, subpart 5. Definitions. Chemical Dependency Treatment

27. The Department proposes to amend the definition of chemical dependency treatment by referencing the rule which contains the types of rehabilitation treatment drivers must take to qualify for relicensure. As amended, the rules states:

> "Chemical dependency treatment" is treatment for chemical dependency as specified in part 7503.1700, subpart 2, item A. [in an approved program]. * * *

The Department adopted this amendment to tie the definition of chemical dependency treatment to the treatment requirements in part 7503.1700 subpart 2, item A. The amendment clarifies the rule and is not substantive in nature. The Administrative Law Judge finds that the decision to amend the rule was shown to be necessary and reasonable.

7503.0100, subpart 10. Definitions. Special Review

28. A "special review" is currently defined as "a personal conference with and examination of a driver for the purpose of evaluating the person's driving ability and possible chemical abuse following an alcohol- or controlled-substance-related incident." The Department proposes to redefine the words to mean "the process of notifying a driver and receiving written confirmation that the driver understands that an alcohol- or controlled-substance-related incident not currently on the driver's Minnesota driving record may result in the cancellation and denial of driving privileges in Minnesota."

29. The definition is being changed because the Department has decided to eliminate the current requirement that it examine and evaluate drivers who have had alcohol- or controlled-substance-related incidents. Under current rules, when a driver has two alcohol- or controlled-substance-related incidents within five years or three or more incidents on record, the Department is required to meet with, examine and evaluate the driver. Minn. R. 7503.2100. The purpose of this "special review" is to evaluate the person's driving ability and chemical use problems.

30. Persons who have committed alcohol- or controlled-substance-related incidents usually are ordered by the courts to complete a chemical assessment which includes an evaluation of the person's chemical or alcohol use and treatment recommendations. Minn. Stat. § 169.126. Because of these court-ordered assessments, the Department has determined that special reviews are unnecessary. Hence it proposes to repeal part 7503.2100 and amend 7503.0100, subp. 10. Both actions were shown to be necessary and reasonable.

31. Although subpart 10 is necessary and reasonable, the Department should consider replacing the words "special review" with words which are more descriptive. Terms like "special notice" "or special review notice" would be clearer and would avoid the confusion caused by using an existing term to

describe a new process. Therefore, the Administrative Law Judge recommends that the rule be amended to read as follows:

> "Special review notice" means the process of notifying a driver and receiving written acknowledgment from the driver that the driver understands that any new alcohol- or controlled-substance-related incident appearing on the driver's Minnesota driving record may result in the cancellation and denial of driving privileges in Minnesota.

Alternatively, the rule could be simplified considerably if amended as follows:

> "Special review notice" means the notice given to a driver and the acknowledgment received from a driver under part 7503.1250.

Amending the rule in either manner proposed by the Judge would not constitute a substantial change for purposes of Minn. Stat. § 14.05, subd. 2 and either alternative would be necessary and reasonable.

7503.1250 Special Review

32. Part 7503.1250 is the new rule pertaining to special reviews. It requires the Department to send written notice to a driver who has two incidents relating to the use of alcohol or controlled substances within five years or three or more incidents on record.

33. The Department did not explain why the special review notice is mailed when a person has two incidents within five years or three or more on record. It should have explained its rationale. However, it appears that the rule is based on Minn. Stat. § 169.121, subd. 4(a)(4) and (5) (1996) which requires license revocation:

> (4) for an offense occurring within five years after the first of two prior impaired driving convictions or prior license revocations: not less than one year, together with denial under section 171.04, subdivision 1, clause (8), until rehabilitation is established in accordance with standards established by the commissioner.
>
> (5) for an offense occurring any time after three or more prior impaired driving convictions or prior license revocations: not less than two years, together with denial under section 171.04, subdivision 1, clause (8), until rehabilitation is established in accordance with standards established by the commissioner.

The statute involves one more incident than the rule. Consequently, giving the driver notice under the rule provides the driver with prior warning that an additional offense will result in license cancellation and denial. The two standards for giving notice are consistent with the Department's intent and are necessary and reasonable.

34. The warning notice form required under part 7503.1250 is sent to a driver by first class mail. The form requires the driver to attest that the driver understands that if any incident involving alcohol or controlled substances subsequently appears on the driver's Minnesota driving record the driver's license may be canceled. The Department did not cite any statute requiring a special review notice at the times set forth in the rule, but it historically gave such notice at special reviews Vang v. Commissioner of Public Safety, 432 N.W.2d 203, 205 n.1 (Minn. Ct. App. 1988). Giving notice at the times set forth in the rule was shown to be a necessary and reasonable notice provision.

7503.1300 License Cancellation and Denial.

35. This rule pertains to the cancellation and denial of licenses for failing to complete special review action, having multiple alcohol- or controlled-substance-related incidents, or consuming alcohol or controlled substances after completing rehabilitation. Because the current special review provisions in the rule are being replaced by a warning notice, the Department is proposing to amend subpart 1 of the rule to require the cancellation and denial of the license and driving privileges of any driver who fails to return the special review notice in part 7503.1250.

36. In its SONAR, the Department did not cite the statute authorizing license revocation for a driver's failure to return the completed special review form. The SONAR also does not indicate if the special review notice is required by statute. Consequently, the Administrative Law Judge requested that the Department cite the statute authorizing the rule. The Department cited Minn. Stat. § 171.14. It provides, in part, as follows:

> The commissioner shall have authority to cancel any driver's license upon determination that the licensee was not entitled to the issuance thereof hereunder, or that the licensee failed to give the correct or required information in the application, or committed any fraud or deceit in making such application.

37. The statute arguably authorizes the proposed rule and because the Department's authority to adopt it was not questioned, it is concluded that the rule is authorized. Proposed rules generally should not be rejected on the grounds that they exceed an agency's rulemaking authority when the issue is not raised at the hearing and fully discussed.

38. The Commissioner has broad rulemaking authority and laws relating to drunk driving, being remedial in nature, should be liberally construed to protect the public Vang v. Commissioner of Public Safety, 432 N.W.2d 203, 207-08 (Minn. Ct. App. 1988). Hence, express statutory authority is not given a "cramped reading" and the enlargement of express powers by implication is permissible if "fairly drawn and fairly evident" from the agency's objectives and express powers. Hirsch v. Bartley-Lindsay Co., 537 N.W.2d 480, 485 (Minn. 1985), citing People's Natural Gas Co. v. Minnesota PUC, 369 N.W.2d 530, 534 (Minn. 1985).

7503.1700, subpart 1. Rehabilitation; when applicable.

39. This rule contains three criteria for determining when a person must complete rehabilitation. One of them currently requires a person to complete rehabilitation when "a special review has been conducted within 10 years of the third incident and there are three alcohol- or controlled-substance-related incidents on record. . . . " The Department is proposing to delete the quoted language and add language requiring rehabilitation when "a third alcohol- or controlled-substance-related incident occurs within 10 years from the date the person completed the required special review actions. . . ."

40. The changes proposed by the Department are designed solely to clarify confusing language. They are not intended to make a substantive change. As amended, the rule requires rehabilitation when a third incident occurs within ten years of completing special review actions instead of requiring rehabilitation within ten years after a special review. The Administrative Law Judge agrees that the proposed change is necessary and reasonable.

41. There is some ambiguity in the amended rule arising from the term "special review actions." The quoted words could refer to the actions required of a driver under 7503.2100, subp. 2 -- which is being repealed, to the special review notice form a driver must complete and deliver to the Department under new part 7503.1250, or to both situations. Because the Department failed to discuss the rule in any detail, its intent is unknown. Consequently, the Administrative Law Judge will not make any recommended language changes. It is recommended, however, that the Department clarify the language used.

7503.1700, subpart 2. Rehabilitation; requirements.

42. The Department's current rule relating to the requirements for rehabilitation require that a person successfully complete treatment for chemical dependency following the last documented date of the person's use of alcohol or controlled substances and submit evidence of the treatment undertaken to the Commissioner. (Subp. 2A). In addition, a person must participate in an abstinence-based support group and submit evidence of attendance to the commissioner which shows regular participation for at least the past three months (Subp. 2B). The person must also abstain from the use of alcohol and controlled substances and furnish evidence of abstinence to the Commissioner (p. 2C), and the person must appear for a rehabilitation interview by a departmental employee (Subp. 2D). The Department has proposed changes to the current rule. Most of the proposed amendments set mandatory, minimum hourly amounts of treatment. The standards proposed by the Department were somewhat controversial.

43. As amended, Minn. R. 7503.1700, subp. 2 requires successful completion of chemical dependency treatment which meets the following requirements:

(1) the chemical dependency treatment must be in a program that requires abstinence;

(2) for an individual's initial treatment, primary chemical dependency treatment for a minimum of 48 hours of individual, group, or family counseling must be successfully completed;

(3) for an individual's second or subsequent treatment, relapse chemical dependency treatment for a minimum of 24 hours of individual, group, or family counseling must be successfully completed and is acceptable only when primary treatment has previously been successfully completed; and

(4) the chemical dependency treatment may include aftercare, which is additional treatment not to exceed 180 calendar days, prescribed by a treatment program for the successful rehabilitation of the individual, other than the primary treatment or relapse treatment, and which may include the abstinence-based support specified in item B.

44. The requirement that chemical dependency treatment must be in a program that requires abstinence is not new. That requirement was previously included in the definition of "chemical dependency treatment" under Minn. R. 7503.0100, subp. 5 which stated that "[a]ll programs must include a requirement of abstinence." Consequently, the need and reasonableness of the abstinence requirement need not be reestablished in this proceeding. Minn. R. 1400.2070, subp. 1D (1995).

45. The Department chose to require a minimum of 48 hours of initial treatment and 24 hours of subsequent relapse treatment based on the recommendation of the Commission on Confinement and Treatment of DWI Recidivists. SONAR at 12. Although that Commission recommended 55 hours of primary treatment, most of the primary treatment programs in the state offer at least 48 hours of primary treatment and in meetings with treatment professionals the Department staff has been advised that a 48-hour minimum would be sufficient for effective rehabilitation. SONAR at 13.

46. The policy committee of the Minnesota Association of Resources for Recovery and Mental Health (MARRCH) submitted written comments on the rule. MARRCH is the primary professional organization in the chemical dependency field in Minnesota. MARRCH's policy committee polled approximately 80 of its members to get their input on the 48 initial treatment hours proposed by the Department in Minn. R. 7503.1700, subp. 2. Sixteen of the nineteen committee members who responded supported the 48-hour minimum standard for initial treatment proposed by the Department. Ex. 30. Some of the committee members objected to the minimum-hour requirements proposed by the Department on the grounds that any decisions about the length and intensity of a person's treatment is a therapeutic issue which should be determined between the treatment professional and the client. The persons who

objected reported that the adoption of minimum hour requirements is inconsistent with the current direction in the chemical dependency field which endorses individualized treatment planning. Id. The same view was expressed by other individuals and groups.

47. Steve Schneider, chair of the planning and policy committee for the State Alcohol and Other Drug Abuse Advisory Counsel and Judi Gordon, chair, State Alcohol and Other Drug Abuse Advisory Counsel made similar remarks. In their written comments they stated:

> We are however, concerned with the revised rules prescribing the minimum number of treatment hours for primary outpatient and relapse treatment. . . .This approach is in stark contrast to the evolution of the chemical dependency treatment field, which now focuses on individualized treatment plans, and lengths of stay which reflect successful achievement of specified treatment objectives. There has been a move away from "canned" programs, which offer the same number of treatment days or hours for all clients. Clients enter treatment assessment at the level of care determined to be necessary based on an assessment, and are discharged, or transferred to another level of care as progress is documented. The Department of Human Services Chemical Dependency Division is now in the process of facilitating the development of criteria which will guide the decisions pertaining to continuing care and discharge from the various levels of care, further supporting this move towards individualized treatment planning and length of stay.
>
> The proposed rules, in an effort to be more clear and precise about the rehabilitation requirements, fail to address how inpatient treatment will be counted to meet the hour requirements. Some clients will be in need of inpatient treatment, or some combination of inpatient and outpatient treatment.
>
> These rules will result in the client at times being caught between their insurance plan, which will only authorize a certain number of treatment hours, the treatment provider who believes a certain number of hours are clinically appropriate, and the Department of Public Safety, who with no consideration for the client's specific disease process or treatment progress will require a specific number of treatment hours.

Ex. 29.

48. Mark Casagrande, program director at Park Avenue Center expressed a similar view. He stated:

> As the rule is currently written, we stand to work with and get paid for literally dozens of clients that have remained abstinent for

over a year that are simply entering treatment as a condition of getting there [sic] license reinstated. Although this sounds like we would be in favor of keeping the rule the way it is currently written, we can not ethically support such an idea. For most DWI offenders, I strongly agree that chemical dependency treatment is the best alternative. However, there are a large number of offenders that simply abstain on there [sic] own or with the help of 12-step programs, religion, family, or friends. To simply mandate that they complete treatment despite their individual circumstances becomes redundant and counterproductive.

Currently, clients wishing to enter chemical dependency treatment must obtain a chemical health assessment performed by a trained professional in order for Managed Health Care to pay for services. Clients wishing to enter treatment under Rule 25 funding must also obtain such an assessment. These assessors are trained to meet state guidelines set forth by the Minnesota Department of Human Services. In order to maintain consistency throughout Minnesota, I strongly suggest that the Minnesota Department of Public Safety simply follow the same guidelines set forth by the Minnesota Department of Human Services.

Comment A.

49. Robert T. Olander, division manager of the Hennepin County Chemical Health Division supported Casagrande's remarks. Mr. Casagrande had noted that he had several patients in treatment who had not used alcohol for over one year and were participating in chemical dependency treatment solely to regain their drivers' licenses. Mr. Olander also discussed difficulties complying with the Department's rules. He stated:

> The Chemical Health Division is concerned that people are required to go to chemical dependency treatment when they have indicated, and can show evidence, that they no longer use alcohol and/or other drugs, and solely to fulfill a DPS mandate. The problem is especially acute for publicly funded county residents when, for whatever reason, they do not immediately enter a treatment program. Time passes and they somehow become and remain chemically free. They now decide they need a drivers license, contact our division to schedule an alcohol/drug use assessment (Rule 25), and then find out they are not eligible for a treatment referral when they tell the assessor they have been chemically free for a year or more. We cannot fund a treatment episode, clients cannot afford to pay treatment episode costs themselves, they have no insurance, and they are then not able to fulfill the DPS mandate for rehabilitation through treatment.

Comment C.

50. The Department disagrees with these and other, similar objections to rules setting minimum hourly treatment standards. The Department's position has a rational basis and was shown to be needed and reasonable. There are a significant number of repeat DWI offenders in the state. SONAR at 2. For many of these offenders, little or no treatment is recommended and treatment recommendations are inconsistent. Furthermore, offenders frequently conceal, deny or minimize their problems. In some cases, assessments are altered when no money is available to pay treatment costs. This practice likely will become more common as health care payers move to cut treatment costs. Similarly, as those payers reduce the amount of treatment they will cover, treatment recommendations likely will be negatively impacted. Inadequate treatment adversely affects success rates. See generally, Departmental Comment of July 2, 1997 at 2-4.

51. The chemical dependency field is quite young and is constantly changing. Although a system-wide restructuring effort is in a planning stage, evaluations are still inconsistent. The Department's decision to adopt minimum hourly treatment standards under the circumstances is necessary and reasonable.

52. It was argued that the Department has no authority to adopt treatment standards for chemical dependency professionals. However, the Department's rules do not establish practice standards. They establish standards for the relicensure of DWI offenders and are within the Department's authority. The rules do impact on practice standards, but the impact necessarily results from the Commissioner's exercise of his rulemaking power.

53. As noted by several commenters, some individuals may have difficulty paying for treatment. That is a legitimate concern. However, public safety cannot be jeopardized in order to reduce the financial hardships that may flow from completing needed treatment. As noted by the Department, persons who drive while intoxicated present an enormous cost to society.

54. In determining the reasonableness and necessity of Item A, subitems 2 and 3, which require a minimum number of hours of chemical dependency treatment, the Administrative Law Judge has considered whether they are excessive and whether they can be met. Requirements which can not be met would be unreasonable since the rules are aimed at rehabilitating drivers and eventually allowing them to drive again. However, the number of hours required are not excessive. There are a variety of programs available to drivers -- including outpatient care and split shifts -- and the hours need not be met within a minimum time period. Hence, the driver may choose a program which is convenient. The concern that certain persons may not be able to fund required treatment may be alleviated by other rules which allow a variance in the amount of treatment required in these parts. The variance has certain conditions and will be discussed further when that part is addressed.

55. However, variances are exceptions to the conditions required in these two subitems. They do not allow for substantive exceptions to treatment, but may result in a change in the amount of treatment which an individual is otherwise required to receive. The variance rule, if reasonably applied, may benefit those who can not fund treatment themselves but have alternative means for working with the Department to verify sobriety and support. Therefore, the minimum number of hours should be attainable by the vast majority of drivers whose licenses have been canceled. The goal of the Department is not to restrict the role of chemical health assessors nor discredit their ability to make assessments. The Department does not intend to engage in the assessment process. However, the Department is charged with protecting public safety, which includes protecting the public from intoxicated drivers. The Department must choose a means to ensure that public safety will be protected. This protection includes some level of assurance that there will be an attempt made to prevent drivers from driving while intoxicated. For those whose licenses have been canceled, the concern is that much greater. The Department has chosen to require a minimum number of hours of treatment to ensure the protection of public safety. The fact that other means could be used to prove sobriety does not mean the requirements in subpart 2, item A, subitems 2 and 3, are unreasonable.

56. The State alcohol and Other Drug Abuse Advisory Council stated that the rules fail to address how inpatient treatment hours will be counted. As the Department stated, however, only hours spent in "individual, group or family counseling" qualify. There is no evidence suggesting that further specificity is necessary.

57. Subpart 2(4), which pertains to aftercare, was shown to be needed and reasonable because aftercare often is a required element in chemical dependency treatment. Aftercare was included in the rules because some programs recommend it. The Department received no recommendations regarding the minimum number of aftercare days an aftercare program should entail. Consequently, aftercare other than that specified in subpart 2B is not required. The Department has limited the number of aftercare days a person must take to 180. This was done because some treatment professionals view aftercare as lifetime situation. The 180-day limitation is designed to ensure a point of closure to treatment so that relicensure may occur.

58. Ten of 19 members of MARRCH's public policy committee members supported the 180-day cap on aftercare. The other nine members felt that the duration of aftercare should be determined by treatment professionals. The Commission on Confinement and Treatment of DWI Recidivists recommended that the legislature specify the minimum number of contact days and hours and type of contract required for rehabilitation. (SONAR at 2). However, the Commission made no recommendation regarding the number of contact days for aftercare. The Administrative Law Judge is persuaded that a cap is necessary and reasonable to ensure a point of closure for relicensing purposes. The cap apparently will be eligible for a variance. That should tend to

protect the vitality of programs having an aftercare component and may reduce program shopping. However, the Judge is not familiar with the treatment field and must tread softly in this area. Consequently, no substantive recommendations have been made regarding the aftercare rule.

59. Subpart 2 B. requires a person to participate in a "generally recognized support group based on ongoing abstinence, at least once a week for 12 consecutive weeks immediately before submitting to the commissioner evidence showing compliance with the rehabilitation requirements." It is substantially the same as current rule 7503.1700, subp. 2 B. It was rewritten solely to clarify the meaning of the words "regular participation" which are used in the current rule. Those words have been replaced with the words "at least once a week for 12 consecutive weeks." The amended rule uses a 12-week duration rather than the 3-month duration in the current rule. The new standard for at least one weekly contact for 12 weeks is consistent with the aftercare regimen of most treatment programs. SONAR at 15-16.

60. Judi M. Gordon, Executive Director of C.R.E.A.T.E., Inc. disagrees with the rule requiring an offender to attend 12 consecutive weekly support group meetings immediately before applying for a license. She said:

> This requirement is onerous for the client and the treatment provider. Repeat offenders in most counties are currently enrolled in repeat offender programs which have been tailored according to the current thinking of the profession. That is one of seeing the client in gradually fewer sessions a week over at least a year. Most programs see the offender two to four times a week for 12 wks. followed by once a week for 12 wks., twice a month for three months and once a month thereafter. This requirement is the opposite of that weaning process that we have found works well. What I would suggest is that the rule require documented abstinence throughout the waiting period. This can be done once a month with random urinalysis or support sessions or with reliable collateral contacts.
>
> The result of adding rules such as these is that the field is asked to adapt to a standard which runs counter to standards of practice and counter to the direction that our own Dept. of Human Services is looking for the future of the profession. We underline the fact that this is a profession just as psychology or medicine. There are issues involved here when DPS mandates what standard must be followed by a profession they have no authority over. The fact that no treatment provider may object to the rules once adopted leaves our profession with no recourse other that the courts or legislation to object to this mandate of standards for our practice. Ex. 27.

The State Alcohol and Other Drug Advisory Council suggested that the rule require at least monthly contacts for those months.

61. Generally speaking, an agency is not required to establish the need and reasonableness of existing rules not affected by proposed amendments. Minn. R. 1400.2070, subp. 1D (1995). Because the Department's amendment to subpart 2D does not change its meaning, as interpreted and applied by the Department, it is unlikely that the need and reasonableness of the Department's amendment must be established in this proceeding. Assuming the contrary, the Administrative Law Judge is persuaded that its need and reasonableness was established. The Department showed that the rule reflects existing practice in much of the regulated industry and promotes attendance at abstinence-based mutual help groups like Alcoholic's Anonymous and Rational Recovery. SONAR at 12; July 2, 1977 Departmental Response at 6.

62. Judi Gordon suggested that Subpart 2B require documented abstinence throughout the waiting period in the form of random urinalysis or support sessions with reliable collateral contacts. Ex. 27. The Department rejected this suggestion because part 7503.1700, subp. 4 requires documented abstinence. Moreover, the Department has determined that the type of verification Gordon suggested would be a significant policy change which should not be addressed in this proceeding.

63. Subpart 2B also was criticized because individuals have sometimes chosen to find support networks for their sobriety outside of the generally recognized categories of abstinence-based support groups. Although drivers will find support from other sources in certain instances, the decision to require participation in a recognized support group makes verification of participation simpler for the Department. The time period of twelve weeks is not unreasonably long. Therefore, the Administrative Law Judge finds that the proposed amendment is needed and is reasonable.

7503.1700, Subpart 2a. Variance to amount of treatment

64. This amendment authorizes the Commissioner to grant, on an individual basis, a variance from the amount of treatment required of an individual. The Department has stated that it has authority under Minn. Stat. § 14.05, subd. 4 to grant such a variance. The statute states that "[u]nless otherwise provided by law, an agency may grant a variance to a rule." However, subdivision 1 of the same statute states that "[e]xcept as provided in section 14.06, sections 14.001 to 14.69 shall not be authority for an agency to adopt, amend, suspend or repeal rules." Although the power to adopt variance rules under subdivision 4 is arguably taken away by subdivision 1, the Administrative Law Judge is persuaded that variance rules are not within the scope of the quoted language from subdivision 1. The reason for this is that the variance rules authorized by subdivision 4 pertain to procedures and standards by which variances are granted or denied. Rules relating to procedures are governed by section 14.06 and are excepted from subdivision 1. Therefore, the Department has authority to adopt variance rules.

65. The Department stated that a variance is reasonable because there may be unforeseen reasons why an individual may not be able to meet the

conditions of rehabilitation as required by 7503.1700, Item A, subitems 2 and 3 which state the minimum number of hours required for primary and relapse treatment. The Department intends to use this process on a case-by-case basis to determine eligibility. The individual seeking the variance is required to ask for the variance. The Department will not consider variances for any individual who does not request one.

66. The Administrative Law Judge finds that the use of a variance is necessary and reasonable. The variance allows the Department to be flexible with its requirements in those cases which meet the variance conditions. The use of the variance may become necessary for some in order to regain their driving privileges.

67. The scope of subpart 2A is unclear and the language used may not reflect the Department's intent. The variance rule states that variances from the "amount" of chemical dependency treatment "specified in" part 7503.0100, subpart 5 are available. The definition of "chemical dependency treatment" does not refer to any treatment amounts. Instead, it refers to part 7503.1700, subp. 2, item A. The only treatment "amounts" in the latter rule are contained in subpart 2A (2), (3) and (4). That is: 48 hours of initial treatment, 24 hours of relapse treatment and 180 days of aftercare.

68. In its SONAR, however, the Department mentioned variances from primary treatment, relapse treatment and participation in abstinence based support. No mention was made of variances from aftercare amounts. In its post-hearing comments the Department also talked about variances from rehabilitation criteria and treatment "other than that specified in rule", Department's Comment of July 2, 1997 at 7. If the word "amounts" is intended to mean something other than hours or days of treatment, or if the word is intended to include program requirements, the Department should clarify the language used.

69. Assuming that the Department's intent is only to grant variances from the durational requirements in subpart 2A, it should amend the rule to read as follows:

> The commissioner may grant a variance from the durational amounts of chemical dependency treatment set forth in part 7503.1700. Subpart 2 item A subitems (2), (3) and (4). Variances must be requested by the person to whom the treatment applies and approved on an individual basis.

The proposed amendment would be necessary and reasonable and would not constitute a substantial change for purposes of Minn. Stat. § 14.05, subd. 2. If the Department intends to grant variances from subpart 2B but not from subpart 2 A (4), it should amend the rule to say that.

7503.1700, Subpart 2b, Variance Procedure

70. This amendment describes variance procedures. The amendment requires the variance request to be submitted in writing to the Commissioner. Item A states that the request must contain the specific language or rules from which the variance is requested; Item B requires a statement of the reasons why the rule cannot be met; and Item C requires a description of the proposed alternative treatment plan, which will protect the interests of public safety as effectively as the requirements from which the variance is requested.

71. The Department stated that it is important to document the request by requiring it to be in writing and equally important for the driver to clarify from which rules or requirements a variance is requested so that the Department knows which requirements must be considered. This clarification by the driver allows the Department to compare the alternative plan with the existing proposed requirements in order to determine whether the alternative plan is sufficient. The Department also stated that it is important to know why the driver seeks the variance so that the exceptions to the requirements do not become the rule. The Department intends to use this section to prevent those who simply would like to use an alternative plan from being granted a variance. Instead, the Department intends to use the variance for those situations where rehabilitation requirements can not be met. The Department's view is that a variance should not be used to avoid the intent of the rules, which is to protect the public safety. Therefore, in an alternative plan, the driver must demonstrate how the plan will effectively protect public safety as much as the original requirements. This requirement allows the purpose of the rules to be maintained.

72. The Administrative Law Judge finds that the variance procedure is reasonable. The Department should have documentation of the variance request in writing with the driver's explanation of which parts of the rules cannot be met. Additionally, the Department should know why the driver believes the rules cannot be met. The alternative plan should take public safety into consideration so that the rules and alternatives are consistent with one another. The protection of public safety for both the rules and the alternative plan upholds the same standard in both situations so that all drivers face the same or very similar requirements. The Administrative Law Judge finds that the proposed rule is needed and reasonable.

7503.1700, subpart 2c, Variance criteria; conditions.

73. There are six conditions which must be met before the variance will be granted. Item A requires the request to have been made in accordance with 7503.1700, subpart 2b. Item B requires the alternative plan to have no adverse impact on public safety. Item C states that the alternative plan must be equivalent to or superior to that required in the rules. Item D states that the driver must show that strict compliance with the rule will impose an undue burden on the applicant. Item E states that the variance may have only future effect. Item F states that the variance may not vary a statutory standard.

74. The Administrative Law Judge finds these requirements to be reasonable and needed. The variance request should comply with the

procedural requirements articulated in 7503, subpart 2b. Public safety is a primary goal of these rules and therefore it is reasonable to expect the alternative plan to be at least equal to the requirements in the rules and to expect that the variance will not endanger public safety. It is reasonable to grant the variance in those cases where the applicant shows that complying with the rules will impose a burden which the driver cannot meet. It is reasonable to make the variance effective once the commissioner grants it. Applicants should not assume that applying for the variance allows them to violate the existing rules. The applicant should assume that the existing rules apply until the variance is granted. The variance, legally, may not vary a statute. Therefore such a condition is necessary and reasonable.

7503.1700, subpart 2d. Notice of decision

75. This rule requires the Commissioner to notify the applicant in writing of the decision to grant or deny the variance, and contains other requirements. Item A states that the notice must state the time period for which the variance is effective, if it is granted. This will include the conditions and treatment which the applicant must meet. Item B states that the basis for denial of the variance shall include the applicant's failure to meet the conditions in 7503.1700 subparts 2b or 2c. Item C states that the denial notice shall state the reasons for denial and state that the applicant may request review of the denial by the chemical abuse review panel established in part 7503.2200. Item D states that the alternative conditions given in the variance shall have the full force and effect of the rules. Item E states that any violations of the alternative plan subject the driver to the penalties attached to the applicable rule. Item F states that if the variance is granted, the driver shall notify the commissioner in writing within thirty days of any material change in the conditions on which the variance was granted.

76. The Administrative Law Judge finds that the requirements regarding notice of the decision are reasonable. It is reasonable to require the Commissioner to notify the applicant in writing of the decision. It is necessary for the applicant to know what conditions are part of the variance so that those conditions may be met. It is reasonable to use the failure to meet the conditions of 7503.1700 subparts 2b and 2c as a basis for denial of the variance. It is necessary to notify the applicant that the conditions of the variance have the same effect as the rules so that the driver understands that failure to comply with the variance subjects the driver to the same penalties as are attached to the rule from which the variance was granted. Additionally, it is necessary that the Commissioner be notified in writing of any changes in the conditions of the variance so that public safety can be maintained. The requirement of thirty-days notice of any change is reasonable. Therefore, the Administrative Law Judge concludes that the proposed amendment is necessary and reasonable.

7503.1700, subpart 3, Evidence of Chemical Dependency Treatment

77. This part requires the applicant to demonstrate the successful completion of treatment. It requires the driver to state the last reported date of the use of alcohol or drugs, and the number of hours of primary or relapse

treatment completed. It requires verification of successful completion of treatment -- either primary, relapse or aftercare treatment -- and a discharge summary with a prognosis and any further recommendations of the program (an already existing requirement).

78. The Department stated that the requirement to report the last day of the use of alcohol or drugs enables the Department to determine the start date of abstinence and, therefore, the length of the driver's sobriety. It also stated that the additional reporting requirements are necessary to link this part to earlier parts in which the conditions of treatment have been changed, including part 7503.1700, subpart 2. This reporting requirement enables the Department to determine if the driver has complied with part 7503.1700, subpart 2.

79. The Administrative Law Judge finds that the proposed changes to this part are reasonable. They require the driver to demonstrate successful compliance with the treatment requirements in part 7503.1700, subpart 2. Therefore, the Administrative Law Judge concludes that the proposed amendment is necessary and reasonable.

7503.1700, subpart 8, Fraudulent documentation

80. This subpart imposes sanctions for drivers who knowingly offer false information of compliance with the rehabilitation requirements under these rules. False documentation includes false or misleading documentation of compliance with the rehabilitation rules. The submission of fraudulent information will result in the reinstatement of driving privileges only after compliance with all rehabilitation requirements under these rules, as well as an additional year of "abstinence" beyond the amount which is required in part 7503.1700, subpart 5. The rule is authorized under Minn. Stat. § 171.41.

81. The Department stated that in order to protect public safety it is important to prohibit falsification of treatment evidence. In order to deter persons from submitting false information, it is reasonable to require an additional abstinence period of one year before the reinstatement of driving privileges. The Administrative Law Judge agrees that the prohibition of submitting false information of treatment is necessary in order to protect public safety. Drivers who have not met the minimum requirements of rehabilitation set out in the rules pose a greater risk of danger to public safety if their driving privileges are reinstated. An additional one-year period of abstinence is a reasonable requirement to ensure that the driver truly has maintained sobriety and to discourage persons from submitting false information to the Department. Therefore, the Administrative Law Judge concludes that the proposed amendment is needed and is reasonable.

82. In a post-hearing comment the Department indicated that the words "an abstinence period" should be replaced with the words "a cancellation period" because part 7503.1700, subpart 8 is intended to be punitive. Such an amendment is necessary and reasonable and would not constitute a substantial change under Minn. Stat. § 14.05, subd. 2 (1997).

7503.1700, subpart 9, Additional Offense

83. This part states that if an individual who is required to complete rehabilitation as required in the rules commits an alcohol or drug-related offense before beginning or completing rehabilitation, the person will not be eligible for reinstatement of driving privileges until all requirements of rehabilitation have been met, and an additional year of abstinence, beyond that required in part 7503.1700, subpart 5, has passed.

84. The Department stated that this section is necessary in order to distinguish between those who commit offenses and begin rehabilitation and those who commit offenses, refuse to participate in rehabilitation, commit further offenses, and then chose to begin the rehabilitation process. The additional one year requirement of abstinence distinguishes between these two groups of drivers, and is a reasonable requirement to ensure that the offender will not be eligible to drive until the threat to public safety is diminished.

85. The Administrative Law Judge finds that this part is reasonable. It imposes one additional year of abstinence on the offender who refuses to begin the rehabilitation process and again commits an alcohol or drug related offense. This requirement ensures the protection of public safety by requiring such persons not only to complete the rehabilitation process, but also complete one additional year of abstinence. This requirement is not excessively long or burdensome. The Administrative Law Judge concludes that the proposed amendment is needed and reasonable.

7408.0100, 7408.0200, 7408.0300 and 7503.2100 are proposed to be repealed.

86. Minn. R. 7408.0100-.0300 governs the funding of chemical assessments. The statutory provision which authorizes these parts was repealed in 1992. Therefore, these parts are obsolete. They are therefore proposed for repeal. Part 7503.2100 is the current language dealing with special reviews, which require the Department of Public Safety to make assessments of drivers' eligibility. The proposed amendments do away with this section's requirements, and the existing rule therefore is inconsistent with the proposed changes and should be repealed.

87. In 1976 the legislature adopted legislation requiring counties with populations of 10,000 or more to establish alcohol safety programs to provide for the evaluation of persons convicted of driving under the influence of alcohol or controlled substances. The Department was required to reimburse the county for part of the cost incurred for each assessment made. Minn. Stat. § 169.124. In 1987, the law was amended to require every county to establish an alcohol safety program and the Department adopted rules relating to alcohol problem assessment reimbursement. 11 S.R. 1741-43, March 23, 1987. In 1990, the reimbursement provisions in the statute, among other things, were repealed. Laws 1990, c. 602, art. 2, § 10.

88. The same year, however, legislation was enacted which required the Commissioner to adopt rules governing the reimbursement of assessment costs counties incurred in their alcohol safety programs. Minn. Stat. § 169.126, subd. 4c (1990). In 1992 the Department's rulemaking authority was repealed. Laws 1992, c. 570, art. 1, § 31. The Department has not followed or relied upon the rules contained in chapter 7408 since 1992 when the Department's rulemaking authority was repealed. Because the rules in chapter 7408 are no longer authorized[2] their repeal is authorized, necessary and reasonable

CONCLUSIONS

1. That the Department of Public Safety gave proper notice of the hearing in this matter.

2. That the Department of Public Safety has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.

3. That the Department of Public Safety has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the Department of Public Safety has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the Department of Public Safety after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department of Public Safety from further modification of the rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

[2] Under Minn. Stat. § 14.05, subd. 1, when a law authorizing rules is repealed the rules adopted pursuant to the repealed law are automatically repealed. Nonetheless, the Department is required to identify and repeal obsolete rules (Minn. Stat. § 14.05, subd. 3) to avoid confusion.

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted except where otherwise noted above.

Dated this 25th day of August, 1997.

JON L. LUNDE

Administrative Law Judge